

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 399 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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RAJPUT CHANDU MAGAN

Versus

STATE OF GUJARAT

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Appearance:

Mr. K.G.Sheth for the appellant.

Mr. M.A.Bukhari, A.P.P. for the respondent.

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CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 16/08/96

ORAL JUDGEMENT : (Panchal,J.) :-

By means of filing this appeal under section 374 of the Code of Criminal Procedure,1973, the appellant has challenged legality and validity of the judgment and

order dated June 1,1991, rendered by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case no.60/90 convicting him under section 302 of the Indian Penal Code and sentencing him to undergo R.I. for life.

2. The prosecution case is that witness Savuben Gavuben is wife of deceased Jagdish Mansukhbhai, who was residing at Rukhadiya Hanuman, Mafatnagar, Bhavnagar and was a mason by profession. The deceased was residing with Savuben without marrying her and was staying separate from his parents. The incident took place on January 26,1990 at about 7.45 p.m. Eye witness Kalubhai Nathubhai had gone to answer nature's call in an open place situated opposite his house. He saw the appellant chasing the deceased and inflicting 7 to 8 blows on deceased by means of Gupti. Meanwhile, witness Savuben came at the place of occurrence crying, as she was informed by a lady that her husband was assaulted. Kalubhai informed her that her husband was assaulted by the appellant. Because of assault mounted on him, deceased died on the spot. On learning that deceased had died, Savuben went to Bhavnagar City "C" Division Police Station for giving information about commission of offence by the appellant. Ravjibhai Lavjibhai Chaudhary, who was on duty as Police Inspector at the Police Station,, recorded complaint of Savuben and entered the same in the register kept at the Police Station. As the complaint indicated that serious offence was committed, P.I. Mr. Chaudhary also conveyed necessary information to his superior officer. He requisitioned services of two independent panchas and prepared inquest report. The blood stained clothes of the deceased were seized under a panchnama. The dead body of deceased was sent for postmortem and Dr. B.K.Joshi performed autopsy on the dead body. Thereafter the investigating officer recorded statements of witnesses including Kalubhai Nathubhai and Shantuben, wife of the deceased. The investigating officer made search about the accused, but the accused was not available at his house. The investigating officer, therefore, prepared panchnama under section 165 of the Code of Criminal Procedure. Thereafter, the appellant surrendered before the police with blood stained Gupti. Therefore, in presence of independent panch witnesses, investigating officer prepared arrest panchnama and seized blood stained Gupti. The incriminating articles were sent to Forensic Science Laboratory for the purpose of analysis. The investigating officer also got prepared panchnama of scene of offence. At the conclusion of investigation, the appellant was chargesheeted under section 302 of the Indian Penal Code. As the offence under section 302 of

I.P.C. is triable exclusively by Court of Sessions, the case was committed to Sessions Court for trial and it was numbered as Sessions Case no.60/90.

3. The learned Additional Sessions Judge, Bhavnagar framed charge at exh.2 against the accused under section 302 of I.P.C. The charge was read over and explained to the appellant. The appellant pleaded not guilty to the charge and claimed to be tried. The prosecution, therefore, examined following witnesses in order to prove its case against the appellant :-

- (1) Dr. Bhanushanker Kantilal Joshi, PW.1, Exh.7.
- (2) Kalubhai Nathubhai, PW.2, Exh.17.
- (3) Savuben @ Gavuben Popatbhai, PW.3, Exh.18.
- (4) Jesalbhai Bhagvanbhai, PW.4, Exh.20.
- (5) Bhanubhai Bhimjibhai, PW.5, Exh.21.
- (6) Vasantbhai Babubhai Chudasma, PW.6, Exh.23.
- (7) Bipinbhai Mansukhbhai Baraiya, PW.7, Exh.28.
- (8) Shantuben Ramjibhai, PW.8, Exh.29.
- (9) Ramjibhai Lavjibhai Chaudhary, PW.9, Exh.30.
- (10) Patel Rajnikant Jasvantrai, PW.10, Exh.31.

The prosecution also relied on documentary evidence such as postmortem notes exh.8, complaint filed by Savuben and produced at exh.19, panchnama of scene of offence, inquest report, panchnama of seizure of blood stained Gupti, report of analyst etc. to prove its case against the appellant.

4. After recording of evidence of the prosecution witnesses was over, the learned Judge examined the appellant generally on the case and recorded his statement under section 313 of the Code. In his statement under section 313 of the Code, the appellant stated that case of the prosecution against him was false. However, he did not lead any evidence in defence.

5. After taking into consideration the evidence led by the prosecution and hearing the parties, the learned Judge recorded following conclusions :-

- (1) The evidence of Dr. Bhanushanker Kantilal Joshi, P.W.1, Exh.7 read with the contents of postmortem notes exh.8, proves it beyond reasonable doubt that deceased Jagdish Mansukhbhai died a homicidal death.
- (2) Witness Kalubhai Nathubhai, PW.2, Exh.17 is an independent witness and is neither related to the complainant nor to the deceased and as he has no grudge against the accused. his evidence is

trustworthy and reliable. His evidence indicates that he had seen the appellant inflicting Gupti blows on the deceased as a result of which, the deceased had fallen down on the ground. The evidence of witness Kalubhai Nathubhai gets complete corroboration from medical evidence as well as evidence of the complainant and the contents of complaint.

- (3) Evidence of Savuben, PW.3, Exh.18, gets corroboration from not only her complaint, but also from the evidence of Kalubhai Nathubhai.
- (4) Evidence of witness Shantuben, PW.8, Exh.28 proves that deceased was chased by the appellant on January 26, 1990 at about 7.00 to 7.30 p.m.
- (5) The medical evidence on record indicates that injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death.
- (6) The appellant with an intention to cause death, inflicted injuries on the deceased by means of Gupti and, therefore, he is guilty under section 302 of I.P.C.

6. In view of the above referred to conclusions, the learned Judge convicted the appellant under section 302 of I.P.C. and imposed sentence which is referred to hereinabove, giving rise to the present appeal.

7. Mr. K.G.Sheth, learned Counsel for the appellant has taken us through the entire evidence on record. It was pleaded on behalf of the appellant that there was no sufficient light at the time when the incident took place and, therefore, identification of the appellant by Kalubhai Nathubhai, who was answering call of nature is doubtful. It was submitted that the assertion of witness Kalubhai Nathubhai that he had informed Savuben about the assault on the deceased by the appellant, stands completely belied by the admission made by Savuben in her cross-examination to the effect that she had no talk with witness kalubhai Nathubhai and this indicates that Kalubhai Nathubhai had not witnessed the incident. Learned Counsel further contended that neither the evidence of Savuben nor the evidence of Shantuben is reliable and, therefore, conviction deserves to be set aside. In the alternative, it was pleaded that inquest report indicates that there was discharge of semen from the private organ of the deceased and, therefore, because of indecent behaviour of the deceased near the house of the appellant the deceased must have been attacked by the appellant due to grave and sudden provocation which would bring the case under the provisions of Section 304

of the Indian Penal Code and, therefore, also the appeal deserves to be accepted in part.

8. Mr. M.A.Bukhari, learned A.P.P. submitted that eye witness Kalubhai Nathubhai, PW.2, Exh.17 is an independent witness and as he has no grudge against the appellant, his evidence is rightly believed by the Trial Court. It was emphasised that evidence of independent witness Kalubhai Nathubhai is not only corroborated by the medical evidence on record, but is also corroborated by the evidence of Savuben as well as Shantuben and other circumstantial evidence on record, which indicates that he had seen the appellant inflicting blows on the deceased by means of Gupti and, therefore, appeal deserves to be dismissed. After referring to seizure panchnama, it was pleaded on behalf of the respondent that Gupti which was produced by the appellant at the time of surrender, was blood stained, which indicates involvement of the appellant in the incident in question. Learned Counsel for the State Government emphasised that cogent and convincing reasons have been given by the learned Trial Judge while convicting the appellant under section 302 of the Code and in absence of good grounds, the same should not be interfered by the Court in appeal.

9. The fact that deceased Jagdish Mansukhbhai died a homicidal death is not seriously challenged before us in the present appeal. Dr. Bhanushanker K.Joshi, PW.1, Exh.7 has stated in his evidence that he had performed postmortem on the dead body of Jagdish Mansukhbhai at about 9.35 a.m. on January 27,1990. External as well as internal injuries which were noticed by him, have been elaborately stated by him in his evidence as well as noted in postmortem notes produced by him at exh.8. The medical officer has emphasised before Court that the injuries were possible by Gupti which was produced before the Court as muddamal article no.2 and the injuries were sufficient in the ordinary course of nature to cause death. The cause of death as mentioned in postmortem notes is haemorrhagic shock resulting from injury to the liver, spleen and left lung. Having regard to the medical evidence on record, we are of the opinion that prosecution has proved beyond reasonable doubt that deceased died a homicidal death and the finding recorded by the learned Judge on this issue is hereby upheld.

10. The evidence of witness Kalubhai Nathubhai shows that on January 26,1990 he had gone to open space situated opposite his house for the purpose of answering nature's call. He has clearly deposed before the court

that he had seen the appellant chasing the deceased and giving 7 to 8 blows by means of Gupti to the deceased. The witness has testified before the Court that after causing injuries to the deceased, the appellant had disappeared in a nearby street. He has deposed that many persons had collected there and he had informed the wife of the deceased who was crying that her husband was assaulted by the appellant. In his testimony before the Court, the witness has asserted that the appellant is residing near his house and, therefore, he knew him. The witness has further asserted that he had identified the appellant as assailant with the help of light emitting from electric pole. In cross-examination, the witness has stated that the incident had taken place in the open space between Machhivada and Jyoti Soap Factory. He also stated during the cross-examination that on the date of incident he had not gone for fishing, but had returned at his home by 5.00 p.m. The witness has asserted that the place which he had used for answering nature's call, was also getting sufficient light from the nearby huts situated in Machhivada where electricity connection is made available. The witness has denied the suggestion that he was giving false deposition at the instance of his brother-in-law Bharat, who according to the defence, was a bootlegger. In no uncertain terms the witness has asserted that his police statement was recorded at 10.00 p.m.

11. It is relevant to note that this witness is neither related to the complainant nor to the deceased. The defence has failed to bring on record any fact which would suggest that the witness had any enmity with the appellant. The witness is fully corroborated by the medical evidence. The medical evidence shows beyond shadow of doubt that the deceased had 9 external injuries. The evidence of witness Kalubhai Nathubhai also gets ample corroboration from the evidence of witness Savuben. Savuben in her testimony before Court has stated that when she had gone to the place of incident, witness Kalubhai Nathubhai was present and she was informed by witness Kalubhai Nathubhai that the appellant had assaulted her husband. The fact that witness Kalubhai Nathubhai had informed Savuben that the appellant had assaulted her husband is also mentioned in the complaint which was filed immediately without any loss of time. The assertion of witness Kalubhai Nathubhai that his police statement was recorded at 10.00 p.m. by the investigating officer also gets corroboration from the evidence of investigating officer. His evidence is clearly supported by circumstantial evidence like panchnama of scene of offence. Under the

circumstances, his presence at the time of incident can hardly be doubted. The submission that in absence of sufficient light the appellant could not have been identified by witness Kalubhai Nathubhai as assailant and, therefore, benefit of doubt should be given to the appellant is devoid of merits. The witness has clearly asserted that he was able to identify the appellant as assailant with the help of light which was being shed from the nearby electric pole. The witness has also testified before the Court that the place which he had used for the purpose of answering nature's call, was also getting light from nearby huts. The evidence of Kalubhai Nathubhai shows that he was going to Sea at about 10.00 p.m. to 11.00 p.m. for the purpose of fishing. This means that his eyes were accustomed to see during night hours. There is nothing on record to suggest that powers of seeing of this witness were in any manner affected because he had witnessed the incident while it was dark. The learned Judge has given cogent and convincing reasons for coming to the conclusion that witness Kalubhai Nathubhai had witnessed the incident and identified the appellant as assailant of the deceased. Those reasons are to be found in para-24 of the judgment. It would not be out of place to notice that witness Kalubhai Nathubhai has asserted in his testimony that dim light was emitting from the electric pole which was at a distance of about 230 ft. His assertion that dim light was emitting from electric pole, is reasonable one and does not cast any doubt about identification of the appellant as assailant of the deceased, more particularly when both the appellant as well as deceased were well-known to him. On totality of the evidence led by the prosecution, we are of the view that witness Kalubhai Nathubhai correctly identified the appellant as assailant of the deceased and he had not committed any mistake in identifying him.

12. The submission that witness Kalubhai Nathubhai stands contradicted by the evidence of witness Savuben, who has stated that she had no talk with Kalubhai and, therefore, evidence of Kalubhai should be rejected, has no substance at all. It is true that while under cross-examination witness Savuben has stated that she had no talk with Kalubhai. However, Kalubhai has testified before the Court that Savuben was crying and he had informed her that her husband was assaulted by the appellant. This is also so stated by Savuben in her examination-in-chief. Savuben also so stated in her complaint which was filed without loss of time. It is well settled principle of law that evidence has to be read and appreciated as a whole and cannot be appreciated by picking-up one sentence from examination-in-chief or

cross-examination. On overall reading of the evidence led by the prosecution, we are satisfied that the say of witness Kalubhai Nathubhai that he had informed Savuben that the appellant had assaulted her husband is true and amply borne out from the record of the case.

13. The evidence of Shantuben shows that on the date of the incident between 7.00 p.m. and 7.30 p.m. she had seen the deceased being chased by the appellant while she was cooking. Her testimony indicates that in order to save himself the deceased had entered front door of house where she was residing and made his escape good from the rear door of the house; whereas the appellant had also entered front door of her house and followed the deceased through rear door after leaving house. Though this witness is cross-examined searchingly, nothing has been brought on record to shake her version at all. The evidence of investigating officer Ramjibhai Lavjibhai Chaudhary read with the evidence of witness Bhanubhai Bhimjibhai, PW.5, Exh.21 shows that blood stained Gupti was seized from the appellant when he surrendered to police. The Gupti seized was sent to Forensic Science Laboratory for the purpose of analysis. The report of Senior Scientific Assistant-cum-Assistant Chemical Examiner, Government of Gujarat, Junagadh produced by the prosecution at Exh.16 shows that Gupti had blood having 'O' group which was also the blood group of the deceased. Similarly, the pent worn by the appellant was also found stained with blood of 'O' group which was blood group of the deceased. This circumstantial evidence also proves involvement of the appellant in the crime in question.

14. The Doctor who performed autopsy on the dead body of the deceased, has testified before Court that deceased had 9 external injuries. The internal injuries noticed by the Doctor have been mentioned in the postmortem notes. The deposition of the Doctor clearly proves it beyond reasonable doubt that the injuries caused to the deceased were sufficient in the ordinary course of nature to cause death. This assertion of the Doctor is not challenged in cross-examination.

15. Sum total of the evidence led by the prosecution proves beyond reasonable doubt that the appellant had inflicted injuries on the deceased by means of Gupti, which resulted in his death. The fact that serious injuries were caused to the deceased on vital parts of his body with a dangerous weapon like Gupti, would indicate that intention of the appellant was to kill the deceased. Under the circumstances, the appellant is rightly convicted under section 302 of I.P.C.



16. The submission that find of semen having been discharged indicates that behaviour of the deceased was indecent and, therefore, the appellant, because of grave and sudden provocation, inflicted Gupti blows on the deceased which would bring the case under section 304 of I.P.C., has no merits at all. It is not suggested to eye witness Kalubhai Nathubhai that the deceased was behaving in an indecent manner. Similarly, it is not suggested to the Doctor that discharge of semen is not possible except in case of cohabitation. The Doctor has clearly stated in his sworn testimony that discharge of semen would not take place if a man is found in compromising position with a woman and tries to run away on being spotted by others. The mention in the inquest report that semen was discharged leads the Court to nowhere in absence of any specific evidence on record. As noted earlier, the evidence shows that the appellant had chased the deceased for a pretty long distance and thereafter assaulted him. The deceased was not armed at all. The appellant had inflicted such serious injuries by means of a dangerous weapon like Gupti that the deceased had died on the spot. In fact, the injuries noticed by the Doctor go to show that the appellant had acted in a cruel manner and had taken undue advantage of the situation. Therefore, the case would not be governed under section 304 of I.P.C. In our view, the appellant is rightly convicted under section 302 of I.P.C. As we do not find substance in any of the contentions raised on behalf of the appellant, the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. The muddamal to be disposed of in terms of directions given by the learned Additional Sessions Judge, Bhavnagar in the impugned judgment.

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